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THE STORY OF THE "CONCESSION"

A. H. BLACKISTON*

With Pan American solidarity and its corollary of prosperity for the western hemisphere so closely associated with our foreign policy today, the device or concept in the law which has made possible the basic development of the natural resources of Latin American republics should be of special interest to us. This foundation, without question, is the "concession," partaking of a number of forms, yet nevertheless fundamentally the same.

Its preeminence in our portion of the world dates from the days of the first conquistadores, and continues without a break down to the present. When wisely employed it has proved serviceable as a comprehensive and efficient vehicle for the upbuilding of vast unsettled areas with rich natural resources such as once existed throughout the Americas, and are still found in many regions there.

Diversified conditions required a method of procedure of great flexibility. This was afforded by the concession, which, upon necessity, can comprise a virtually complete code of laws governing the attainment and regulation of the business it is intended to foster. It is in effect an enabling act, conceived and passed to forward some specific industry or development. Although land grants, government oil leases, and the general franchise, as employed in the United States, may be considered cousins germain to the Latin American concession, they are in no way comparable to the latter in its fullest interpretation. The concession goes several steps further and covers phases which our less inclusive concepts do not even contemplate.

Secondary provisions, such as freedom from import and export duties, exemption of employees from military service, arbitration of any differences with the government, together with other similar matters, are at times included, in addition to the principal subject of the concession. It has proved far more suitable, more adaptable and comprehensive in fostering direct objectives than any available procedure under the Common Law.

The application for the concession is first endorsed by that department of the government which holds jurisdiction in the

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matter. Then, as a rule (depending upon the laws of the specific country concerned), it receives the signature of the President, and finally goes before Congress for its ratification. Thus it becomes a duly enacted law of the nation, and is so entered upon the official records.

The concession can be made the most powerful type of legislation possible in its application to development on any scale. As we have seen, it is eminently suitable to the early stages of economic growth, because it provides every necessary encouragement and at the same time affords a means whereby the extent of power granted is clearly defined.

On the other hand, the very power which attends the concession has often led to abuse, and has worked material hardships in the development of the country issuing it, especially where monopolies were granted without proper safeguards. Such intolerable situations have at times created friction between the granting powers and the concessionaires.

Furthermore, fraudulently obtained concessions have at times resulted in public scandals, similar to those in the United States during the Harding administration. These have most properly led to corrective measures. Unscrupulous or uninformed seekers after concessionary privileges only too often proceed upon the hypothesis that the government should concede everything desired by the wildest imagination and require nothing in return. The only apparent concern of such concessionaires is to reap the greatest benefit with the least responsibility.

Consequently, they strive for an entirely one-sided enactment and employ every device in their power to obtain it, promising in return a superabundance of benefits not only to the immediate community concerned, but also to the country at large. Unfortunately, only too often such verbal considerations have utterly no foundation in fact, while success in obtaining such a concession often defeats the very objects in view, as sight is lost of the fact that in the long run the strongest and most satisfactory agreement is the one that conveys reciprocal benefits and is the most thoroughly equitable to all parties concerned.

It has been the writer's observation over many years' experience in Latin America that when any friction arises, the fault is seldom that of the governments themselves. Most difficulties must be attributed to improper original conception and draughting of the concession, or to lack of due execution. Clear foresight

is required in the preparation of a workable agreement. The entire future of the operations must be envisaged and provisions made which will adequately cover not only present operations and popular trends, but also those which may develop in the future. Otherwise, the unexpected will arise with disconcerting certainty, and non-fulfilment by the concessionaires will be the probable result even though the government may grant as many as eleven extensions, as occurred in the case of a prominent concession of recent years.

It is extremely rare that any of the Latin American countries have cancelled a concession which has met all standards of careful forethought and where adequate capital and responsible management were available. On exceptional occasions, however, governments have been guilty of repudiation, just as we, ourselves, cancelled many inherent property and business rights during prohibition, and as all countries have done in time of war or when they otherwise deemed such procedure advantageous to the body politic.

If seriously conceived and properly obtained and fulfilled, concessions are binding contracts between the governments issuing them on one side and the concessionaires on the other. Furthermore, they have the additional force of duly enacted laws. Indeed, certain Latin American countries have been impressed by the contractual feature to such an extent that they have abandoned the older and generally more common terms, "concession" and "concessionaire" and adopted in their place those of "contract" and "contractor."

The fundamental laws of the country concerned naturally apply, as although the concession has the force of a law in itself, its issuance and scope is of course governed by the constitution of the State. Thus, in Mexico the Constitution of 1917 forbids the granting of monopolies, and any concession which conferred one would *ipso facto* be illegal. Nevertheless, there are many ways in which proper exclusive privileges in limited areas in Mexico may be obtained for protection of business.

The basic laws of most of the Latin American countries are especially liberal and permit great freedom in the enactment of concessionary legislation, which is designed to meet the needs of the specific business, rather than to force the business to conform to the mold of a specific law.

However, the tendency today is toward less sweeping terms,

more mandatory provisions, with limitations of or prohibitions against monopolies, and a definite contractual form. On the other hand, where development has been slight and great natural resources still remain untouched, the governments, in their desire to extend the fullest cooperation toward accomplishment of the desired end, employ the concession in its original unabated force. Only recently a huge petroleum concession has been granted, covering the oil rights under many millions of acres of both public and private domain, the mineral rights under all land in Latin America being vested in the nation alone. This same concession likewise provided for exemption from all production, export and import taxes and duties, the free use of national raw materials, the right of eminent domain, and provision for arbitration of any differences which might arise with the government.

For our purposes, we may regard the concession of Latin America as the descendant of a similar institution existing in the early days of the Roman Empire, and which conveyed sweeping privileges to distinguished military leaders and political favorites, or was farmed out to the highest bidder. The fuller development of the mines on the Iberian peninsula, originally opened by the Celtic natives and the Carthagenians, was accomplished through this medium. In the same way colonies were developed in distant lands which added materially to the prosperity of Rome. Trade as usual followed development that the concessions had made possible.

Probably the greatest concession ever granted was that issued by Ferdinand and Isabella of Spain to Columbus, whereby he was created "Admiral of the Ocean Sea," sole explorer, and lord under the Crown of all lands discovered, such rights to accrue to him and his heirs forever. Thoroughly unaware of the enormous value of what they were bestowing, the monarchs unwittingly created a monopoly which, had it been possible of fulfilment, would have stifled development and changed the entire future of one-half of the world.

Many other concessions of vast proportions, a little better grounded in reason, were employed in building up the Spanish territories of the western hemisphere, and through them were founded most of the great fortunes there. Later, the same legal vehicle served as the basis for the majority of the large developments and industries that have arisen in that portion of the world.

Some of these concessions have been replete with business romance. In one instance a group of enterprising individuals with

but little capital secured a concession permitting them to erect for their own use a wharf at a small port on the Caribbean. From this humble beginning there arose a fortune which ran high into the millions of dollars. The wharf permitted cheaper shipping facilities than those of any rivals, and consequently placed the development of the resources of the rich back-country largely in the hands of the concessionaires. This is a fair example of a concession plus intelligent forethought and serious operation.

Another concession that led to great enterprises in several countries, from railroads to land holdings and steamship lines, was originally granted on a group of guano islands. From this developed varied industries that have done much to promote the economic welfare of a large portion of Latin America.

No concession in modern history has received a stranger or more literal interpretation than was applied in the case of one granted to a group of English capitalists for the construction of the 261 miles of railroad between Vera Cruz, Mexico and Mexico City. The concession was issued around the middle of the last century. Its salient provision for "the construction of a railway from Mexico City to Vera Cruz" appeared innocent enough on its face, but almost resulted in disaster for the entire undertaking, as the concessionaires soon discovered when they began grading the right of way and laying their rails inland from the port of Vera Cruz. Their work was promptly stopped by the executive authority and they were ordered to comply with the concession, as nothing had been mentioned about the road being constructed *from* Vera Cruz, but the law read *from* Mexico City to Vera Cruz instead. Protestations were in vain; President Comonfort was adamant. Consequently, to the great enthusiasm of the arrieros and owners of the pack and wagon trains, every piece of initial construction material—from the right of way machinery to the rails, tanks and all equipment, including even the engines and cars used in the work and in hauling supplies from Mexico City to the railhead as the line progressed—had to be dismantled and carried across the mountains over the old Spanish *caretera* on the backs of mules or in ox-carts to the capital city 7,500 feet above sea level. Thus was the railway duly constructed according to the letter of the concession, *from* Mexico City to Vera Cruz.

Unfortunately, the burden was in no way lightened by the fact that this noted old treasure trail followed the route of Cortes and was famous in history and song, or that it was the same one which the ex-muleteer, who was created Marquis of Rayas when

he struck the fabulous silver bonanza at Guanajuato, offered to pave with ingots of solid silver so that the king of Spain might drive only over precious metal for the entire 261 miles if he would consent to cross the seas to visit the once humble muleteer.

Perhaps, a little prescience on the part of the English attorneys and the addition of the words "or vice versa," would have obviated the enormous amount of extra labor and expense. Nevertheless, despite these difficulties the enterprise was very successful from the start, and doubtless the additional costs were soon absorbed in the large earnings of the line. Today a more liberal construction would certainly be employed, and this concession is now recalled only as an extreme example of the ridiculous interpretations of a past age though probably once looked upon by the beneficiaries—the muleteers—as an example of exemplary wisdom and far reaching patriotism.

We are accustomed to hearing pained and vociferous complaint when a concession happens to lapse or is declared inoperative, irrespective of whether such action results from the expiration of time limits clearly defined, or from the usual cause of non-fulfilment.

So strongly is this realized in Latin America that a Cabinet officer of one of the largest of those countries once requested me to some time tell the other side of the story. I do not know how this could be done more clearly than by relating the experience of this same official which prompted the request.

The Secretary of the Treasury and myself had called upon him in regard to certain matters of importance both to my clients and to the country itself. He explained that he had kept us waiting due to the very strenuous session he was having with a mission sent from a certain European nation to collect \$8,000,000 in damages, which it claimed as indemnity for the cancellation of a concession which had legally lapsed twenty years before, on account of non-fulfilment. A former President and Congress had granted several million acres of land at an entirely inadequate price of a few cents an acre, the total amounting to approximately \$2,000,000, payable over a term of years. Although the first two installments (not exceeding \$400,000 in all) were eventually paid, nothing further was forthcoming, notwithstanding the fact that the government had sent numerous notices and had granted repeated extensions of the date of fulfilment. Twenty years went by without governmental action despite the fact that the concession, as noted, had long before become inoperative upon the

occurrence of default. At last the concessionaires were notified that if the concession continued to remain unfulfilled it would be declared *caduco*—null and void—a step which was later taken due to the complete absence of any effort toward compliance on the part of the concessionaires. Then the indignant mission appeared upon the scene and threateningly demanded the payment of the \$8,000,000 damages on a matter that had involved to date only about one-twentieth of that amount. As the Minister wiped his brow and prepared to settle down to the business before us, I asked what his country intended to do. "What can we do?" he replied, "they have a noted navy—we have none."

Despite the growing economic importance of the Latin American countries, the concession still plays a very important part in our relations with those republics, and is destined to assume an even more prominent role as capital from the United States continues to be employed there in ever-increasing quantities. Without these ties of business and commerce the solidarity of the Americas will prove to be but a shallow term.

The present time is the most auspicious in history for the United States to mind its own business and build up its fences in Latin America. The chief subversive elements have become quiet for the time being, with the leading powers of Europe at war among themselves. Until now there has always existed a most strenuous opposition to favorable business relations between this country and its Latin American neighbors; and, quite contrary to the general belief created by current "news," no propaganda has been more detrimental and unscrupulous than that of England and France. Entire newspapers have been subsidized for the purpose. These have been used systematically to circulate imaginative stories of intended conquest by the United States.

It is business association and its reactions which bind, and these are felt in a greater or less degree from the highest official and businessman down to the humblest Indian in his palm thatched hut. For the attainment of such ends we must bring to bear something more concrete than high-sounding pronouncements from Washington and something more constructive than squandered millions which at best can serve only as a stopgap. The task is primarily one for the business men on both sides. The politician has often hindered far more than he has assisted. The irresponsible newspaper with its distorted reports, both here and elsewhere, contributes more than its quota of misunderstanding and prejudice to aggravate the situation.

American capital, in spite of all difficulties, has done and is still accomplishing much in the upbuilding of the smaller countries of the New World. It is well, however, to recall that either we shall have to continue and amplify this work ourselves, or others will do it in our stead; and that if we fail to complete such development, we cannot logically object to those who are willing to do so. Wherever we go in pursuit of our objective, we shall find the concession awaiting us, either as an aid of greatest value, or as a barrier, depending upon the degree of intelligence and knowledge with which it is employed.